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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re F.K., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

S.K. et al.,

Defendants and Appellants.

D074920

(Super. Ct. No. J511858C)

ORDER MODIFYING OPINION AND
DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

On page 28, starting at the end of line 18, delete the sentence:

"The appellate court concluded the juvenile court erred by removing the children from her care and denying her reunification services. (*Ibid.*)"

and replace with the following:

"Based on the circumstances in that case, *In re E.T.* concluded the juvenile court erred by finding the beneficial parent-child relationship exception did not apply and terminating the mother's parental rights. (*Id.* at pp. 70, 76-78.)"

The petition for rehearing is denied.

There is no change in the judgment.

O'ROURKE, Acting P. J.

Copies to: All parties

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(Super. Ct. No. J511858C)

APPEALS from a judgment of the Superior Court of San Diego County,

Gary M. Bubis, Judge. Affirmed.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant S.K.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for
Defendant and Appellant F.J.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Emily Harlan, Deputy County Counsel, for Plaintiff and Respondent.

S.K. (Mother) and F.J. (Father) appeal a judgment terminating their parental rights to their minor child, F.K., and selecting adoption as his permanent plan. On appeal, they contend: (1) the juvenile court abused its discretion by summarily denying Mother's Welfare and Institutions Code section 388¹ petition to modify the court's prior orders; and (2) there is insufficient evidence to support the court's finding that the beneficial parent-child relationship exception did not apply to preclude a permanent plan of adoption for F.K. and termination of their parental rights. Based on our reasoning below, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2017, Mother left F.K., then-three years old, at a friend's home while that friend was asleep that evening and without the friend's permission. At 5:30 a.m. or 6:00 a.m. the following morning, the friend awoke and found F.K. unsupervised and crying outside her home. F.K. was wearing a long-sleeved T-shirt and no underwear. Over the following four days, the friend and her neighbor unsuccessfully attempted to get Mother to pick up F.K. Mother eventually contacted the friend, telling her she had been in a car accident and had just escaped from the hospital. Mother told the neighbor she had been sick. When Mother failed to pick up F.K. after five days, the neighbor took F.K. to the fire department and he was later taken into protective custody. At the

¹ All further undesignated statutory references are to the Welfare and Institutions Code.

Polinsky Children's Center (PCC), F.K. was observed to be dirty and had scratches on his right arm and hand and an abrasion on his chin. When asked who took care of him, F.K. replied, "Nobody."

A social worker for the San Diego County Health and Human Services Agency (Agency) spoke with Mother, who stated she had asked her friend to watch F.K. because she (Mother) had to clean some apartments. Mother admitted lying to the friend about being in a car accident because her cleaning job was taking longer than expected and she wanted the friend to continue caring for F.K. Although Mother denied any current substance abuse and stated she had been "clean" for years, she had an arrest in March 2017 for possession of a controlled substance and arrest warrants related thereto in May 2017. Agency's investigation showed that Mother had a long history of substance abuse and a pattern of leaving her children with strangers for days at a time without provisions for their care.

Agency filed a section 300, subdivision (b) juvenile dependency petition on F.K.'s behalf alleging F.K. had suffered or there was a substantial risk he would suffer serious physical harm or illness as a result of the failure or inability of Mother to adequately supervise or protect him. Agency's detention report stated that Mother had a prior dependency case involving her two daughters, who are now adults, based on general neglect or abandonment arising out of Mother's substance abuse. Although that case continued for over 10 years, Mother never reunified with her daughters. At the detention hearing, the juvenile court ordered that F.K. be detained at PCC or an approved foster home. A few days later, F.K. was placed in a confidential licensed foster home with

foster parents who were willing to provide him with permanency. When he first arrived at the foster home, F.K. was angry, cursing, and wetting the bed each night. However, his behavior improved within a short time thereafter. He was able to deescalate when he began to become overwhelmed.

Agency's initial jurisdiction and disposition report stated that Mother appeared to be surprised by her June 2017 positive drug test results. When questioned, Mother admitted she had a long history of using methamphetamines, which use began when she was 14 or 15 years old. She admitted she recently had been smoking methamphetamines two to three times per week and had last used methamphetamines the day before her interview with the Agency social worker. Agency referred Mother to meet with a substance abuse specialist.

In its addendum report, Agency reported that Mother's supervised visits with F.K. generally went well, but he became very upset when she missed two scheduled visits. In August, about three months after F.K. was removed from her care, Mother enrolled in the La Posta outpatient substance abuse program, but had missed two group sessions since her enrollment. Mother was living in a home known as a drug house. When Mother visited with or called F.K., she was always appropriate with him. However, her recent visitation request had been cancelled by the visitation center because of its inability to contact her. She also had not maintained contact with Agency. Although Agency initially had recommended that Mother receive reunification services, it changed its recommendation to a denial of reunification services because she had not quickly engaged in services and committed to establishing her recovery from substance abuse.

Furthermore, Agency's "deeper review" of the prior dependency case involving Mother's two daughters showed a "distinct similarity" with F.K.'s case despite the 20-year span between them. By recommending denial of reunification services to Mother, Agency hoped that F.K. could be provided with the stability and permanency that he needed and deserved.

In its second addendum report, Agency reported that F.K.'s behavior had deteriorated because of Mother's decreased contact with him. She had not called him for two weeks. F.K. was showing more anger and aggressive behavior, cursed more, and tried to kick his therapist. A coordinator for the La Posta outpatient substance abuse program reported that Mother had not been to the program for two weeks and had walked away twice when she was asked to take a drug test. Mother was going to be discharged from the program. The coordinator recommended that Mother complete a residential treatment program and referred her to two programs but had not yet heard back from her.

At the October 2017 contested jurisdiction and disposition hearing, the juvenile court received in evidence Agency's detention report, its jurisdiction and disposition report, and two addenda reports. Father testified by telephone regarding his paternity and the court found he was one of F.K.'s two presumed fathers. After hearing closing arguments of counsel, the court made true findings on the petition and declared F.K. a dependent of the court. The court found Father was a noncustodial parent and that placement with him would be detrimental to F.K. The court denied reunification services to Father pursuant to section 361.5, subdivision (e)(1) because of his incarceration. It denied reunification services to Mother pursuant to section 361.5, subdivision (b)(10).

The court removed F.K. from Mother's custody and placed him in a licensed foster home. The court set a section 366.26 hearing for February 2018 to select a permanent plan for F.K.

In a February 2018 report, F.K.'s court-appointed special advocate (CASA) recommended that Mother's and Father's parental rights to F.K. be terminated and that adoption be selected as his permanent plan. F.K. was doing well in his foster home where he had been placed since June 2017. However, his foster parents were no longer interested in adopting him. New potential adoptive caregivers had been identified and were having visits with F.K. Mother had been inconsistent in attending her weekly supervised visits with F.K. F.K. often got upset and acted out on his way to visits with Mother. That acting out included urinating on the floor, pulling his hair, and scratching or picking at himself. That behavior became more frequent or worse when Mother missed a visit or did not make a scheduled call to him.

In its section 366.26 report, Agency stated that F.K. had made good progress in therapy and had improved in his overall emotional and mental health. However, F.K. would have extreme emotional reactions when Mother missed visits, which reactions often continued through the following day. For example, he would say, "she isn't coming because I'm stupid!" or "I'm nobody, nobody loves me!" He would also act aggressively toward the other children in his foster home. Agency stated F.K.'s current foster parents were unwilling to adopt him. Agency recommended that the section 366.26 hearing be continued for 60 days to assess the best permanent plan for F.K.

At the initial section 366.26 hearing in February 2018, the court continued the hearing pursuant to Agency's request.

In its April 2018 addendum report, Agency recommended that Mother's and Father's parental rights to F.K. be terminated and that a permanent plan of adoption be selected for him. A potential adoptive family had provided respite care for F.K. for one week, but thereafter no longer wanted to adopt him. Mother entered the Salvation Army's inpatient drug rehabilitation program in late March 2018.

At the April 2018 section 366.26 hearing, the court continued the hearing until July.

In a July 2018 additional information report, F.K.'s CASA reported that F.K. was going to be moved from his long-time foster parents to a new potential adoptive caregiver on July 1, 2018. Because Mother had entered a residential treatment program and been sober for three months, the CASA believed Mother was committed to her sobriety. Mother had been regularly calling F.K. and had not missed any visits with him since March. Therefore, the CASA believed it was no longer in F.K.'s best interests to terminate Mother's parental rights at that time.

In a July 2018 addendum report, Agency stated that per its recommendation a potential adoptive caregiver created a "[l]ifebook" for F.K. and his current caregiver had him watch the movie Despicable Me, whose main character adopted children. Thereafter, an Agency social worker spoke with F.K. about the movie and his thoughts about the movie's children being adopted. When the social worker told F.K. that there was someone who wanted to adopt him and began reading the lifebook, he stated, "No, I

don't want a new mom! I have one mom and her name is [Mother]!" He threw the lifebook at the social worker and stated, "I hate you! I hate her! I hate everyone!" F.K. stated he did not want to leave his current foster home and asked why he could not stay with his current foster parents. He stated he wanted his current foster parents to adopt him.

Agency also extensively reported regarding Mother's recent supervised weekly visits with F.K. After F.K. ate candy and other junk food that Mother brought to one visit, he did not feel well on the way home. At subsequent visits, F.K. brought healthy snacks for Mother and him to eat. Agency continued to recommend that Mother's and Father's parental rights to F.K. be terminated and that a permanent plan of adoption be selected for him.

At the July 2018 section 366.26 hearing, Mother requested a trial and the court continued the hearing until August.

Although F.K. was placed with the new potential adoptive caregiver in early July, that caregiver called the Agency social worker in late July and asked that he be immediately removed from her home. The caregiver explained that F.K. acted aggressively toward her and she did not feel she could meet his needs. F.K. was thereafter moved to a new foster home until a permanent home could be identified.

In an August 2018 addendum report, Agency stated that Mother continued to have weekly supervised visits with F.K. at her drug treatment program facility. Some of the visits were positive, while F.K. exhibited defiant behavior at other visits. In August, Agency identified a new potential adoptive family for F.K. They spent hours visiting

with him in his current placement and reported they were able to deescalate his tantrums and redirect him. Agency's goal was to place F.K. with the new family in early September. Agency continued to recommend that Mother's and Father's parental rights to F.K. be terminated and that a permanent plan of adoption be selected for him.

At the August 2018 section 366.26 hearing, the court granted F.K.'s counsel's request for a continuance to allow F.K. sufficient time to stabilize in his new potential adoptive placement and set the continued hearing for October.

In October 2018, Mother filed a section 388 petition to modify the court's prior orders. In particular, she asked the court to return F.K. to her care with family maintenance services or, alternatively, provide her with increased visitation and six months of reunification services. She alleged her circumstances had changed since the court's prior orders based on her participation in a residential drug treatment program and recent sobriety.

Agency opposed Mother's section 388 petition, arguing that she had not shown there were changed circumstances or that her requested orders would be in F.K.'s best interests. Agency also filed an October 2018 addendum report in which it stated that F.K.'s behavior had improved since his placement in the new foster home. Agency believed that F.K. was placed in a home in which his physical and emotional needs were being met. At that time, F.K. was five years old, had been in foster care for more than one year, and had experienced a lifetime of instability. Agency continued to recommend that Mother's and Father's parental rights to F.K. be terminated and that a permanent plan of adoption be selected for him.

At a hearing on October 30, 2018, the court denied Mother's section 388 petition, finding she had not presented prima facie evidence of changed circumstances or that the requested orders would be in F.K.'s best interests. The court granted Father's request for a continuance of the contested section 366.26 hearing.

On November 7, 2018, the court held the contested section 366.26 hearing. The court received in evidence Agency's reports. Mother testified that when F.K.'s dependency case began, she was at a low point in her life and was addicted to drugs. She testified that she had recently graduated from the Salvation Army's six-month inpatient drug treatment program. She testified that she had a "life transformation" in recovery. She had a sponsor and was participating in church activities. She had just obtained a job the day before and another job the day of the hearing. She testified that she visited F.K. weekly and he was always happy to see her. On cross-examination, Mother admitted that F.K. had refused her telephone calls before he moved to his new placement. In closing, Mother's counsel argued that F.K. was not an adoptable child and that the beneficial parent-child relationship exception applied to preclude termination of Mother's parental rights. Father also argued F.K. was not an adoptable child and his parental rights should not be terminated. The juvenile court found, by clear and convincing evidence, that F.K. was likely to be adopted and none of the exceptions to termination of parental rights applied. The court terminated Mother's and Father's parental rights to F.K. and selected a permanent plan of adoption for him. Mother and Father timely filed notices of appeal challenging the judgment.

DISCUSSION

I

Section 388 Petition

Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition to modify the court's prior orders.² In particular, she argues the court erred by finding she had not made a prima facie showing of changed circumstances and that her requested changed orders would be in F.K.'s best interests.

A

Section 388 allows a parent or other interested person to petition the juvenile court to change, modify, or set aside a previously made dependency order. (§ 388, subd.

(a)(1).) The petitioner has the burden of proof to show that there are changed circumstances or new evidence and that the requested change would be in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*); *In re G.B.*

(2014) 227 Cal.App.4th 1147, 1157; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

A section 388 petition must be liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461 (*Angel B.*).

The petitioner "need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310 (*Marilyn H.*)). However, if the petitioner does not meet that threshold showing, the juvenile court in its discretion may deny a request for a section 388 hearing. (*In re Jasmon O.* (1994) 8

² In Father's opening brief, he joins in and adopts by reference each argument in Mother's opening brief to the extent her arguments inure to his benefit.

Cal.4th 398, 415 (*Jasmon O.*.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*.) The petition's allegations must be specific regarding the evidence to be presented and must not be conclusory. (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478 (*Alayah J.*.) In deciding whether a prima facie showing has been made, the court may consider the entire factual and procedural history of the case. (*Jasmon O.*, at p. 415; *In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.) A summary denial of a section 388 petition does not violate due process. (*Jasmon O.*, at p. 415; *Angel B.*, *supra*, 97 Cal.App.4th at pp. 460-461.)

The decision whether to grant or deny a section 388 petition is within the discretion of the juvenile court. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; *In re Y.M.* (2012) 207 Cal.App.4th 892, 920.) Likewise, a decision to summarily deny a section 388 petition without an evidentiary hearing is within the juvenile court's discretion. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 460; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.) On appeal, a reviewing court will not disturb a discretionary decision by the juvenile court unless it abuses its discretion by making an arbitrary, capricious, or patently absurd determination. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642 (*Marcelo B.*.) The appellant has the burden on appeal to affirmatively show that the juvenile court abused its discretion. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.)

In her section 388 petition, Mother alleged there were changed circumstances since the court's prior orders removing F.K. from her care and denying reunification services for her because in September 2018 she completed the six-month Salvation Army drug rehabilitation program. Her petition listed the number of individual and group counseling sessions she attended, the number of outside and inside Narcotics Anonymous meetings she attended, and the number of other classes she attended. It asserted that she had tested negatively for all substances 14 times between March 2018 and October 2018. It asserted that she had remained consistent with her visitation with F.K. It asserted that her behavior had changed as shown by her willingness to be accountable for her actions and accept responsibility for them. In support of the allegations *ante*, Mother attached certain documents showing, inter alia, her graduation from the Salvation Army program, negative drug tests, and attendance at counseling sessions, meetings, and classes.

Her petition also alleged that her requested order would be in F.K.'s best interests because he had changed placements several times and remained in a temporary foster home. It alleged that because Mother independently obtained services to address the reasons he was removed from her care, she is no longer a risk to his well-being. It alleged F.K.'s bond with her remained strong; he still calls her "Mommy"; and he spontaneously tells her he loves her. At visits, he asks Mother when he will get to live with her again.

At the October 2018 hearing, the court summarily denied Mother's section 388 petition, finding that she had not made a prima facie showing of changed circumstances

or that her requested orders would be in F.K.'s best interests. In so doing, the court stated:

"To me it's not even a close call on either prong. [¶] [M]other has clearly been clean for six months, eight months, but we have a 30-year problem with drugs and alcohol. We're not in a position where she's entitled to custody at this point in time.

"With regard to the best interest prong, I certainly understand all of the behavioral problems that . . . this child has undergone. He finally seems to be in a semi-stable situation, and I don't believe it would be in the best—right now we're looking for his stability, and in my opinion, even if [M]other is clean right now today, because there's no guarantees with regard to this as to whether or not she can maintain that sobriety, and if you look at her past, it's just atrocious as to her ability to remain sober, so I'm going to deny the [section] 388 prima facie showing."

C

Mother argues that the court abused its discretion by finding that she had not made a prima facie showing of changed circumstances. In support of her argument, she cites evidence attached to her petition showing that she completed the six-month Salvation Army drug treatment program, had negative drug tests for eight months, and had consistently visited F.K. However, as Agency notes, by completing the six-month Salvation Army residential drug treatment program, she completed only phase I of the program's four phases. As stated in the October 2018 letter from the Salvation Army, Mother had been afforded the opportunity to participate in Phase II, consisting of its reentry program and job search, which she would complete by obtaining employment. After completion of Phase II, she would be offered the opportunity to participate in Phase III, consisting of residing at its facility while working outside of it. The final phase,

Phase IV, would consist of aftercare and transitional sober living. Therefore, although Mother's completion of the six-month residential drug treatment program is commendable, she did not present any evidence showing that she had completed all four phases of the program. Furthermore, Mother did not present any evidence showing that she had completed any parenting education programs that Agency recommended in July 2017.

Importantly, the juvenile court expressed its belief that Mother's eight-month sobriety while in a residential treatment setting did not show she had overcome the primary issue that led to F.K.'s dependency case (i.e., child neglect resulting from her substance abuse). The court noted that given her 30-year history of substance abuse, an eight-month period of sobriety showed, at best, *changing* circumstances and *not* changed circumstances. It stated: "[T]here's no guarantees with regard to this as to whether or not she can maintain that sobriety, and if you look to her past, it's just atrocious as to her ability to remain sober"

Based on the record on appeal, we conclude the court reasonably found that Mother did not make a prima facie showing that she had resolved the substance abuse issue that led to F.K.'s dependency case. (Cf. *Alayah J.*, *supra*, 9 Cal.App.5th at p. 482 [evidence showed, at best, changing circumstances]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [same]; *Angel B.*, *supra*, 97 Cal.App.4th at pp. 461-463 [juvenile court did not abuse its discretion by summarily denying mother's section 388 petition because evidence did not show she was ready to care for her child despite completion of residential drug treatment program and parenting classes and obtaining employment; her

four-month period of sobriety was relatively brief in comparison to her 22-year history of substance abuse].)

D

Mother also argues that the court abused its discretion by finding that she had not made a prima facie showing that her requested orders were in F.K.'s best interests. In particular, she argues that she presented evidence in support of her section 388 petition showing that placement of F.K. back in her care would promote his stability and continuity because they had a long-standing, close relationship and shared strong bonds of love and affection. In support of her argument, she cites the three factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*). In *Kimberly F.*, the court listed three nonexclusive factors that juvenile courts should consider in assessing a child's best interest: (1) the seriousness of the problem that led to dependency and the reason the problem had not been resolved by the time of the final review; (2) the strength of the relative bonds between the child to both the child's parent and the child's caretakers and the length of time the child has been in the dependency system in relation to the parental bond; and (3) the degree to which the problem that led to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. (*Id.* at pp. 530-532.) However, *Kimberly F.* has been criticized for its focus on a parent's interests as opposed to the child's best interests and its failure to account for the California Supreme Court's prior decision in *Stephanie M.*, *supra*, 7 Cal.4th 295. (See, e.g., *In re J.C.* (2014) 226 Cal.App.4th 503, 527 (*J.C.*).) In *Stephanie M.*, the court stated that stability and continuity are the primary considerations in determining a child's best interests in the

context of placement. (*Stephanie M.*, at p. 317.) Accordingly, after reunification services have been terminated and before a section 366.26 hearing, a parent's section 388 petition requesting a return of custody or granting of reunification services must show that the requested order will advance the child's need for permanency and stability. (*J.C.*, at pp. 526-527.)

Based on our review of the record, we conclude the juvenile court reasonably found that Mother did not make a prima facie showing that her requested orders would advance F.K.'s need for permanency and stability and therefore were in his best interests. The record shows that Mother had a long-standing history of substance abuse and neglect of F.K. and her daughters. Because Mother previously did not reunify with her daughters despite their 10-year dependency cases and had a pattern of leaving her children with strangers for days at a time without provisions for their care, the court in this case could reasonably infer that she could not adequately care for F.K. and provide him with permanency and stability until she had overcome her substance abuse problem. As discussed *ante*, the court reasonably found that Mother had not presented any evidence showing that she had overcome her substance abuse problem. Rather, she showed, at best, that she was making progress toward that goal (i.e., changing circumstances), but did not show she had overcome that problem (i.e., changed circumstances).

Furthermore, contrary to Mother's assertions in her section 388 petition, F.K. was not, at the time of the section 388 hearing in late October 2018, in a temporary emergency foster home, but had instead been placed in a new potential adoptive home in which he had made tremendous progress and his aggressive behavior had drastically

decreased. Also, to the extent Mother cites a letter from her Salvation Army sponsor stating that Mother should have full custody of F.K. because "everyone she meets has nothing but positive things to say about her," the court could reasonably conclude that the sponsor did not have a full understanding of Mother's history and F.K.'s need for permanency and stability and therefore the letter did not show Mother's requested orders were in F.K.'s best interests. In any event, according to Agency's October 2018 addendum report, Mother's then-current residence at Salvation Army housing precluded her from having F.K. live with her. She remained on a waiting list for the family housing unit at which she could have him live with her. As Agency noted, even if Mother were accepted for the family housing unit, it was unknown whether she and F.K. would have stable housing.

Assuming *arguendo* that the *Kimberly F.* factors should be considered in determining F.K.'s best interests, we nevertheless conclude consideration of those factors does not support Mother's section 388 petition. First, considering the seriousness of the problem that led to F.K.'s dependency, the record shows that Mother has had a serious substance abuse problem for over 30 years and that after intermittent and relatively short periods of sobriety she relapses into substance abuse again. Her substance abuse was the primary reason for F.K.'s dependency case. Because, as discussed *ante*, she had not yet overcome her substance abuse problem by the time of the section 388 hearing, the reason for F.K.'s dependency had not yet been resolved. The court could reasonably find there was a substantial risk that Mother would relapse into substance abuse again, which abuse would impact F.K.'s health and safety and need for permanency and stability. Therefore,

the first *Kimberly F.* factor weighs against returning F.K. to Mother's care or granting her reunification services. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Second, considering the strength of the relative bonds between F.K. to both Mother and his current potential adoptive family and the length of time in which he had been in the dependency system, the record shows that F.K. had been in the dependency system for one year four months at the time of the section 388 hearing. Furthermore, the section 366.26 hearing had been repeatedly continued over a period of eight months. Regarding F.K.'s bond to Mother, although the record shows he loves her very much and enjoys visiting with her, his relationship with her is insecure because of her past repeated abandonment of him by leaving him with friends and her history of missing visits with him, which missed visits caused him anxiety and to aggressively act out. The court reasonably could conclude that his then-current placement with a potential adoptive family would provide him with the permanency and stability he deserved. It could further reasonably infer that his improved behavior in his current placement showed that he had a strong and healthy bond with that family. Therefore, the second *Kimberly F.* factor weighs against returning F.K. to Mother's care or granting her reunification services. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Third and finally, considering the degree to which the problem that led to F.K.'s dependency may be easily removed or ameliorated and the degree to which it actually has been, we incorporate our discussion *ante* regarding the first *Kimberly F.* factor. Based on the record in this case, the court could reasonably conclude that Mother's substance abuse which led to F.K.'s dependency would not be easily ameliorated, especially on

consideration of her 30-year history of substance abuse and repeated relapses after periods of sobriety. Although Mother should be commended for completing the six-month Salvation Army residential drug treatment program and remaining drug free while residing there, those circumstances do not show she had overcome her substance abuse problem. Rather, as the court concluded, her progress in overcoming her substance abuse problem shows, at best, changing circumstances and not changed circumstances. Therefore, the third *Kimberly F.* factor weighs against returning F.K. to Mother's care or granting her reunification services. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Accordingly, we conclude Mother has not carried her burden on appeal to show the juvenile court abused its discretion by concluding that she had not made a prima facie showing that her requested order was in F.K.'s best interests. Because we also concluded *ante* that the court did not abuse its discretion by finding she did not make a prima facie showing of changed circumstances, we conclude the court did not abuse its discretion by summarily denying her section 388 petition without an evidentiary hearing.

(*Jasmon O.*, *supra*, 8 Cal.4th at p. 415; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 806; *Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *Marcelo B.*, *supra*, 209 Cal.App.4th at p. 642.)

To the extent Mother argues the evidence supports a contrary conclusion, she misconstrues and/or misapplies the applicable standard of review.

II

Beneficial Parent-Child Relationship Exception

Mother contends there is insufficient evidence to support the juvenile court's finding that the beneficial parent-child relationship exception did not apply to preclude a

permanent plan of adoption for F.K. and termination of Mother's and Father's parental rights. In particular, she argues that there is insufficient evidence to support the court's finding that she did not have a beneficial parent-child relationship with F.K. and that she did not show the benefits to F.K. of that relationship outweighed the benefits of adoption to him.

A

The purpose of a section 366.26 hearing is to determine the appropriate permanent plan for a dependent child and then implement that plan. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) The juvenile court can choose among three permanent plans: adoption, legal guardianship, and long-term foster care. (§ 366.26, subd. (b).) When a child is adoptable, adoption is the preferred permanent plan unless there are countervailing circumstances or if adoption is not in the child's best interests. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 546; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*).)

At a section 366.26 hearing, it is the parent's burden to show an exception to termination of parental rights. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534; *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) One exception to termination of parental rights applies when termination of those rights would be detrimental to the child because the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) That requisite beneficial parent-child relationship means that there is a relationship between the parent and child that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive

parents." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In making the determination of whether the beneficial parent-child relationship exception applies, the juvenile court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*) Because interaction between a child and his or her parent will generally confer some incidental benefit to the child, the parent must prove the child will benefit to such a degree as to overcome the preference for adoption. (*Ibid.*) For the beneficial parent-child relationship to apply, the parent must show that the emotional attachment between the child and the parent is of a parental nature rather than one of a friendly visitor or friendly nonparent relative. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 467; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419 (*Beatrice M.*).)

On appeal, we apply both substantial evidence and abuse of discretion standards in reviewing a juvenile court's determination that the beneficial parent-child relationship exception to termination of parental rights does not apply. (*J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531.) *J.C.* stated:

"[T]he juvenile court's decision whether an adoption exception applies involves two component determinations. 'Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental or sibling relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination.' [Citation.] The second determination in the

exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes 'a "*compelling reason* for determining that termination would be detrimental" ' to the child. [Citation.] This [' "]quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption," is appropriately reviewed under the deferential abuse of discretion standard.' [Citation.]"³ (*Ibid.*)

B

After receiving documentary evidence and hearing Mother's testimony at the November 2018 contested section 366.26 hearing, the court found, inter alia, that the beneficial parent-child relationship exception to adoption did not apply. The court stated:

"... [Mother] is involved in a recovery program, and she is confident in her current recovery. As I said in the [section] 388 [hearing], the focus of this particular hearing now is on the child and stability for the child. Although 6 months is a great start, there has been a long history of not only substance abuse but relapse behavior.

"The relapses have been for various reasons, and maybe now she is sick and tired of being sick and tired and never relapses again. I

³ To the extent Mother argues that the substantial evidence standard applies in reviewing both components of the juvenile court's determination that the beneficial parent-child exception does not apply, we disagree and decline to follow earlier case law in support thereof. (See, e.g., *Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576; *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947, 955; *In re C.F.* (2011) 193 Cal.App.4th 549, 553.) Rather, we believe that more recent cases applying the hybrid standard of review are more persuasive and therefore apply that standard in reviewing the juvenile court's determination in this case. (See, e.g., *J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315; *In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) In any event, even if we had solely applied the substantial evidence standard of review, we would have concluded there is substantial evidence to support the juvenile court's determination that the beneficial parent-child relationship exception did not apply in the circumstances of this case.

cannot take that gamble with [F.K.]. He deserves at age five to have some stability. He suffers from PTSD at the age of five. [F]or a five-year-old to experience this, I guess the argument can be made because he had a lot [of] placements, but if you look at the history of the case, and just the abandonment that occurred which brought the case before the court, it appears that a significant amount of that PTSD can be related to his childhood while . . . [M]other was parenting him.

"Although there is a loving relationship here, I don't have any doubt about that, I have to look at this relationship in terms of a parental relationship. At the time of parenting it was a time of chaos and instability, abandonment, and relapsing; that isn't adequate parenting. When I weigh the type of relationship she may have in light of the history of the case, and her parenting history and parenting abilities, and also weigh in the need for him to have a stable and permanent home, I cannot find that the beneficial [parent-child relationship] exception applies."

Accordingly, the court terminated Mother's and Father's parental rights and selected adoption as F.K.'s permanent plan.

C

Mother asserts that because she showed she maintained regular visitation and contact with F.K. and he would benefit from continuing his relationship with her, the court erred by concluding the beneficial parent-child exception to termination of her parental rights did not apply. (§ 366.26, subd. (c)(1)(B)(i).) However, based on our review of the record, we conclude there is substantial evidence to support the court's findings that Mother did not prove both prongs of that exception and further conclude it did not abuse its discretion by finding that exception did not apply.

Regarding the first prong, we conclude that although Mother frequently visited and called F.K. and had a good and loving relationship with him, there is substantial

evidence to support the court's finding that those visits and calls did not result in F.K. viewing her in a parental role. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) As Agency notes, before the initial section 366.26 hearing scheduled in February 2018, Mother's visits with F.K. were not regular or consistent. On many occasions, she missed her weekly supervised visits, causing F.K. anxiety and his resultant aggressive and self-injurious behavior and other acting out. It was not until after the initial section 366.26 hearing and her admission into the structured environment of the six-month Salvation Army residential drug treatment program that her weekly supervised visits became regular. It is also noteworthy that from the beginning of F.K.'s dependency case in June 2017, Mother's visitation with him did not progress to unsupervised visits.

Furthermore, the court considered Mother's long history of substance abuse and its effect on her parenting of F.K. Mother often abandoned F.K., resulting in trauma to him. When asked in June 2017 who took care of him, F.K. replied, "Nobody." Also, during her supervised visits with F.K., Mother occasionally did not establish appropriate parental limits. For example, she allowed F.K. to play violent or shooting video games until the foster caregiver informed her those games were inappropriate. She also brought candy and other junk food for their snacks, giving F.K. a stomach ache afterward. Accordingly, based on our review of the record, there is substantial evidence to support an implied finding by the court that Mother's relationship with F.K. was not of a parental nature and, assuming it was, her relationship with F.K. was not a beneficial one for him. At the section 366.26 hearing, Mother had the burden to show that the emotional attachment between F.K. and her was of a parental nature rather than one of a friendly visitor or

friendly nonparent relative. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 467; *Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418-1419.) By citing only evidence that would have supported a finding contrary to that made by the court, Mother misconstrues and/or misapplies the substantial evidence standard of review. (*J.C.*, *supra*, 226 Cal.App.4th at p. 530.)

Regarding the second prong, we conclude there is substantial evidence to support the court's finding that F.K. would not benefit from continuing his relationship with Mother to the extent that preserving that relationship would outweigh the benefits he would gain in a permanent home with new, adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In Agency's October 2018 addendum report, it discussed Mother's long history of substance abuse and completion of the first phase of the Salvation Army's program. Agency stated: "It appears as if [Mother] is making progress in her recovery; however, it is clear that she still has a long road of recovery ahead of her. The Agency commends her recent efforts in dealing with addiction; however, these efforts are not substantial in ameliorating the issues which led to [F.K.'s] removal. [Mother] has completed 1/4 of her treatment program and the Agency acknowledges that her circumstances are slowly 'changing' for [her]; however, her circumstances have not changed to the degree to warrant placement of [F.K.] or continuing to delay permanency as the risk factors continue to exist." It further stated: "Once she graduates from this program and successfully completes the second phase of her program, it is unknown if she will maintain her sobriety. Therefore, the Agency cannot gamble with [F.K.'s] permanency by taking the risk of placing him with [Mother]."

Agency believed that F.K.'s "cycle of instability" would continue if he were not provided with stable and consistent parental figures. Because Mother had a 30-year history of substance abuse, Agency did not believe her recent six-month sobriety while residing at the Salvation Army's facility was sufficiently significant to place F.K. in her care. It noted that F.K.'s negative behavior had improved since he was placed with his current caregivers. F.K. had grown to trust them and wanted to continue to be part of their home. He had begun referring to the female caregiver as "Mommy" and did not want to move again. Agency stated that F.K. was in need of stability, consistency, safety, security and deserved to be in a home where he was valued with caregivers who put his needs above their own needs. Accordingly, Agency concluded that adoption was in F.K.'s best interests rather than to make him "wait in emotional limbo indefinitely" for Mother to overcome her substance abuse problems and be able to adequately care for him. Based on Agency's recommendation and other evidence discussed *ante*, we conclude there is substantial evidence to support the court's finding that F.K. would not benefit from continuing his relationship with Mother to the extent that preserving that relationship would outweigh the benefits he would gain in a permanent home with new, adoptive parents. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) We further conclude Mother has not carried her burden on appeal to show the court abused its discretion by finding that the benefit to F.K. of continuing his relationship with her would not outweigh the benefit to him of a permanent home with adoptive parents and finding a permanent plan of adoption was therefore in his best interests. (*J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531.)

To the extent Mother cites evidence and inferences therefrom that would have supported contrary findings by the court, she misconstrues and/or misapplies the applicable standards of review. (*J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531.) In particular, Mother cites evidence showing the strong and loving nature of F.K.'s relationship with her, certain statements he made to others, inter alia, that he did not want a new mom, and the CASA's July 2018 change to a recommendation against termination of parental rights based on Mother's entry into a residential treatment program and three-month sobriety. However, Mother's cited evidence does not show there is insufficient evidence to support the court's finding that F.K. would not benefit from continuing his relationship with Mother to the extent that preserving that relationship would outweigh the benefits he would gain in a permanent home with new, adoptive parents or that the court abused its discretion by finding that the benefit to F.K. of continuing his relationship with her would not outweigh the benefit to him of a permanent home with adoptive parents and finding a permanent plan of adoption was therefore in his best interests. Furthermore, *In re E.T.* (2018) 31 Cal.App.5th 68, cited by Mother, is factually inapposite to this case and does not persuade us to reach a contrary conclusion. In that case, the mother self-reported her drug relapse, voluntarily placed her children with their godparents, and promptly entered into a drug treatment program. (*Id.* at pp. 77-78.) The appellate court concluded the juvenile court erred by removing the children from her care and denying her reunification services. (*Ibid.*) Also, we note that *In re E.T.* may have misconstrued or misapplied the correct standard for the beneficial parent-child relationship exception, phrasing that standard at one point as "whether the children

benefit from Mother's presence in their lives, not whether they could eventually be happy without her." (*Id.* at p. 77.) Accordingly, despite some factual similarities between that case and the instant case, we are not persuaded by *In re E.T.*'s reasoning that the juvenile court in this case erred by concluding the beneficial parent-child relationship exception did not apply and selecting adoption as F.K.'s permanent plan.

DISPOSITION

The judgment is affirmed.

O'ROURKE, Acting P. J.

WE CONCUR:

AARON, J.

GUERRERO, J.